NO. 56305-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TAYLOR DANYELL STOKESBERRY,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 20-1-01561-1

BRIEF OF RESPONDENT

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I. INTRODUCTION

A jury convicted Taylor Stokesberry of first-degree arson for setting her father's house on fire. First, the trial court did not abuse its discretion by denying Stokesberry's motion for a mistrial where the unredacted 911 call was cumulative to other evidence and did not reference any criminal conduct. Any prejudice was cured by the court's instruction to disregard the evidence.

Second, Stokesberry's right to present a defense was not violated because the trial court permitted "other suspect evidence" that Melessa Larson started the fire. The trial court did not abuse its discretion by excluding evidence of Larson's alleged involvement in four prior unrelated fires that were not similar to the charged crime. These prior bad acts were neither material nor relevant and were properly excluded as improper propensity evidence under ER 404(b).

Third, any improper statement from the prosecutor during closing argument was not so flagrant and ill-intentioned that an

instruction could not have cured any prejudice. Stokesberry did not timely object to the statements and did not request a curative instruction or a mistrial. She has not shown prejudicial error warranting reversal. Finally, the cumulative error doctrine does not apply because Stokesberry has not shown that multiple errors deprived her of a fair trial. This Court should affirm.

II. RESTATEMENT OF THE ISSUES

A. Did the trial court abuse its discretion by denying the mistrial motion where the unredacted 911 call was cumulative and did not reference any criminal conduct and where any prejudice was cured by the court's instruction to disregard the evidence?

B. Did the trial court violate Stokesberry's right to present a defense where it allowed other suspect evidence and properly exercised its discretion to exclude Larson's prior bad acts as improper propensity evidence under ER 404(b)?

C. Where Stokesberry did not timely object to the prosecutor's statements during closing argument and did not request a curative instruction or a mistrial, has she shown that the statements were so flagrant and ill-intentioned that a curative instruction could not have cured any prejudice?

D. Does the cumulative error doctrine apply where Stokesberry has not shown that multiple errors deprived her of a fair trial?

III. STATEMENT OF THE CASE

A. Pretrial Motions

The State charged Taylor Stokesberry (hereafter, Stokesberry) with first-degree arson and conspiracy to commit first-degree arson. CP 7-9. A jury trial commenced. *See* 2RP 4.[1]

1. Other Suspect Evidence and Prior Bad Acts

Prior to trial, the court held a hearing on whether Stokesberry could admit "other suspect evidence" using prior police reports and testimony from police officers investigating Melessa Larson's involvement in four prior unrelated fires. 1RP 3-37; *see* 2RP 7-9, 91-93; CP 10-79, 82-88, 90-93.[2] The State agreed that Larson's presence at the scene was admissible as

[1] The Report of Proceedings (RP) is not consecutively paginated and will be referred to as follows: 1RP (6/24/21 pretrial hearing); 2RP (8/31/21 and 9/1/21, consecutively paginated); 3RP (9/2/21, 9/14/21, 9/15/21, 9/16/21, 9/20/21, 10/8/21, consecutively paginated); and 3aRP (9/13/21).

[2] The police reports were admitted as Exhibits No. 1 - 9 at the June 24, 2021, hearing, which are identical to Attachments A – I of the State's Motion to Exclude Prior Bad Acts. *See* 1RP 8-9; CP 10-79, 256. The State will cite to the attachments in this response.

other suspect evidence but argued that her unrelated prior bad acts should be excluded as improper propensity evidence. 1RP 10-13, 19-24; CP 13-20.

The trial court concluded that Stokesberry could present evidence that Larson was present at the scene and started the fire but that evidence of the four unrelated fires was not other suspect evidence and granted the State's motion to exclude these incidents as improper propensity evidence under ER 404(b). 1RP 28-37; CP 96-99; *see* 2RP 7-9, 92-94. The court determined that there was no nexus between the prior incidents and the current crime and that "the only thing that is similar is that they were alleged fires." 1RP 30-37; CP 98-99. The court also determined that there was insufficient evidence that Larson committed two of the incidents and that the other two incidents were too attenuated to be admissible. CP 98-99; 1RP 36-37. The court concluded that any minimal probative value of the evidence was substantially outweighed by the danger of unfair prejudice under ER 403. 1RP 29; CP 99.

2. 911 Call

The State filed a pretrial motion to admit the 911 call from neighbor Geoff Zalot who reported that Stokesberry started the fire and fled. CP 102-05; *see* Ex. 85A.[3] Stokesberry conceded the 911 call was admissible but wanted the following redactions: (1) the reference to her prior drug use;[4] and (2) the statement "if you check the 9-1-1 records and non-emergency, we've had the cops out a bunch lately." *See* Ex. 85 at 1:53-2:04; 911-RP 5; *see* 2RP 27-28. The parties subsequently agreed on these redactions. *See* 2RP 28-29, 72-73; 3aRP 11-13; 3RP 266-69.

The 911 call was admitted as Exhibit 85 and was not published to the jury until nearly all witnesses had testified. *See* 3aRP 128-29; 3RP 215-16. The State stopped the call after

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[3] Because there was no transcript of the 911 call at trial (*see* 2RP 27), the State arranged for a certified court reporter to transcribe the 911 call to aid in appellate review. A motion to supplement the record is pending. The State will cite to the exhibits as evidence, but also reference the transcripts as 911-RP (unredacted call) and 911R-RP (redacted call).

[4] *See* Ex. 85 at 3:19-3:28; 911-RP 6-7 (Q: "Do you know if anybody's drunk or high on drugs?" A: "She has been -- yeah. She's been on drugs. I don't know if she's on drugs right now.")

realizing it inadvertently published the unredacted call. *See* 3RP 216, 262-70. On the next break, Stokesberry advised that she did not object to avoid drawing attention to the error and requested a limiting instruction regarding the reference to the prior 911 calls. 3RP 262.[5]

Stokesberry subsequently requested a mistrial because she incorrectly believed the State published an exhibit that was not filed with the court and argued, "I don't think it's a thing we can undo now[.]" *See* 3RP 263-68. The court stated, "Oh, I don't think it's a big deal, to be honest with you. It's an error for sure, but I don't think it justifies a mistrial." 3RP 264. The court concluded that the error was not significant enough to warrant a mistrial and advised it would consider an appropriate limiting instruction. 3RP 264, 270.

The court subsequently informed the jury that the parties are stipulating to the admission of a corrected 911 call in Exhibit

[5] It is undisputed that the statement about prior drug use was not published to the jury. *See* 3RP 269-70.

85A. 3RP 326-27. Exhibit 85 was withdrawn, and the court instructed the jury to disregard it. 3RP 326. The State then published the redacted 911 call and rested its case. 3RP 327; Ex. 85A; 911R-RP.

B. Trial

Mark Stokesberry,[6] the defendant's father and victim of the arson, testified about the circumstances leading up to and surrounding the fire. *See* 3aRP 24-128. Mark testified that Stokesberry and her boyfriend, Jacob McClellan, had a volatile relationship and had been living with him. *See* 3aRP 27-38, 106-07. Mark described his altercations with McClellan, including McClellan's threatening behavior and screaming at the residence. 3aRP 35-42, 107-08. On one occasion after Mark told him to leave, McClellan returned with a baseball bat, "screaming threats and banging on the doors[.]" 3aRP 38, 107-08; *see* 3RP 348-50. Mark testified that "the neighbors called the police," and

[6] The State will refer to Mark Stokesberry by his first name because he shares the same last name as the defendant. No disrespect is intended.

the police responded and told McClellan to leave. 3aRP 38-40; *see* 3RP 348-50, 381. Mark was embarrassed about everything happening because his neighbors could hear "the screaming in the yard and the constant fighting." 3aRP 86.

Although Mark was not successful in removing Stokesberry from the home, he obtained a restraining order after McClellan threatened him and evicted him. 3aRP 27-29, 41-42, 113, 147. This upset Stokesberry, who told her father he "screwed" himself and would "regret it." 3aRP 28-30. This was mere days before the fire. 3aRP 28; 3RP 388, 406.

Stokesberry and McClellan moved out, but Stokesberry returned the day of the fire. 3aRP 31-32, 44. Mark was uneasy about her arrival and testified about the audio recording he made of their interaction. 3aRP 32, 46-53; Ex. 88. He testified that Stokesberry arrived with an older woman named "Lisa" who he never met before. 3aRP 44-45, 113-14.[7] Stokesberry told Mark

[7] "Lisa" is Melessa Larson. *See* 1RP 9. She will be referred to as Larson unless quoting testimony referring to her as Lisa.

her "friend's out in the yard" and when Larson called out to check on Stokesberry, she responded, "Yeah, I'm good. I'll be out in a second." Ex. 88 at 1:09-1:18; 3aRP 48-50. Stokesberry was upset and told Mark that Larson "will be the one that burns the house down." 3aRP 50-52; Ex. 88 at 1:55-2:00. After Stokesberry went outside, Mark is heard on the audio stating that "she literally said that lady's the one that's gonna burn your house down." Ex. 88 at 2:46-2:53; *see* 3aRP 52-53.

Several minutes later, he heard a popping sound and saw sparks fly past the window. 3aRP 63-68. He looked outside and saw Stokesberry running from the carport near the flames and trying to "duck down behind the fence and sidewalk" before running down the street. 3aRP 63-65, 75-81, 108-11, 124-27; Exs. 11-13, 53, 56, 84. He did not see Larson with her. 3aRP 67, 109-10, 124-27. The fire caused more than $250,000 of damage. 3aRP 72-73, 105; *see* Ex. 87; CP 262. He subsequently discovered the smoke detector was missing from the home and located it in the outside debris. 3aRP 95-97.

Two of the Stokesberrys' neighbors testified at trial—Suzanne Zalot and her 13-year-old daughter Lemon Zalot. *See* 3aRP 129-48; 3RP 22-92, 122-65.[8] Lemon testified that she was outside before the fire started and saw Stokesberry in her backyard talking to a woman named Lisa with long, gray hair. 3aRP 130-35; 3RP 25, 62-65; Exs. 12, 119, 121-122.[9] She recognized Stokesberry's voice and heard Lisa say, "Taylor don't do it." 3aRP 132-33, 146-47.

Because Lemon's parents wanted to know if she encountered Stokesberry, Lemon went inside to tell her parents. 3aRP 134; 3RP 23, 151. Lemon was afraid because Stokesberry "used to, like, scream and yell. And that would give my brother nightmares and scare me." 3aRP 134; 3RP 22-23. Lemon testified that Larson left, and Stokesberry remained at the house. 3aRP 134-35, 141.

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[8] Because they share the same last name, Suzanne and Lemon will be referred to by their first names. No disrespect is intended.
[9] Booking photographs of Larson and Stokesberry were admitted into evidence. 3RP 173-74, 194-95; Exs. 97, 105.

Both Lemon and Suzanne testified that they saw Stokesberry light what they believed was a barbecue grill in the carport. 3aRP 138-42; 3RP 25, 76, 126-31, 152-54; Exs. 12, 82. Suzanne testified that Stokesberry placed "something" down that was "incendiary" and "more than you would normally do for a barbecue[.]" 3RP 127. Within minutes, they heard an explosion, and the house was on fire. 3aRP 139, 144-45; 3RP 27, 127-34; Ex. 84. Suzanne then saw Stokesberry leave, "skipping out of her yard"—Larson was not with her. 3RP 133-34.

Suzanne testified that approximately one week before the fire, Stokesberry "was outside shouting that she would light the house on fire." 3RP 136, 147-48. She heard Stokesberry threaten to light the house on fire approximately five times during the year leading up to the fire, which was a "very tumultuous" time with "a lot of shouting and yelling day and night from her constantly[.]" 3RP 148-50. She saw Stokesberry "standing on the sidewalk screaming hysterically, no shoes on, red face, crying, very dirty, threatening to light the house on fire…." 3RP 149,

162. She explained it was "a roller coaster every day with her"—the Zalots rarely had friends over because they would say "why is there a lady screaming next door?" *See* 3RP 162-63.

On cross-examination, Suzanne testified that Stokesberry was unpredictive and appeared to have mental health problems. 3RP 151. On one occasion, Suzanne called the crisis line for Stokesberry, who refused to talk to them when they arrived. 3RP 161-62.

A fire department captain testified that most of the fire was to the exterior, backside of the house. 3RP 98-99, 102, 109; Ex. 12. Lieutenant Peter Jasper, a fire investigator technician, testified that "the fire was exterior to interior." 3RP 254-57; *see* Exs. 38, 40, 44-47. He ruled out environmental and electrical causes and concluded that the area of the origin of the fire was under the desk in the carport and that it was "incendiary" meaning that a "person used an unknown device to ignite materials[.]" 3RP 247-48, 259-61, 277-98, 305-12; *see* Exs. 12, 50, 53, 55-57, 59, 63, 65-66.

Patrol officer Douglas Walsh subsequently located Stokesberry, who gave him a false name and date of birth. 3RP 192-95, 367. Officer Walsh and Lieutenant Jasper both acknowledged hearing that Larson was present with Stokesberry prior to the fire. *See* 3RP 195-200, 315-17.

Stokesberry did not call Larson as a witness at trial. 2RP 17-18; CP 80-81, 257. But her defense was that Larson started the fire. *See* 3aRP 21-23; 3RP 358-65, 377-89, 408-28, 478-90.

Stokesberry testified that she did not start the fire and that she did not talk to Larson about starting a fire or encourage her to start it. 3RP 344, 370. She acknowledged that there was a lot of yelling and fighting at the residence and that the police were called after McClellan hit her father. 3RP 345-46. She testified that McClellan yelled at her constantly, threatened her, and assaulted her. 3RP 345-46. She agreed that they yelled at each other on a weekly basis in the yard and that the neighbors could hear them. *See* 3RP 346, 374.

Although Stokesberry initially claimed she was not angry with her father for evicting McClellan, she eventually conceded this "upset" her. 3RP 350-51, 373, 381-82, 398-99. She testified that she was startled to see Larson in the backyard on the day of the fire. 3RP 353, 358-64. Although she claimed she was afraid when she saw Larson, she acknowledged inviting Larson inside and telling her she would be "out in a second" before telling her father that Larson would be the one to burn down his house. 3RP 361-63, 413-15, 425-26; Ex. 88 at 1:09-2:00. She claimed she was only trying to warn him. 3RP 361, 383, 413.

Stokesberry testified that she previously heard Larson threaten to burn down the house and blow up her father's tires. 3RP 361-63. She also claimed that she heard McClellan and Larson discussing burning down the house while her father was asleep but that she told them not to do that. 3RP 389, 408.

Stokesberry testified she saw "Lisa set a shopping cart on fire" and "heard many people say that Lisa's known to burn certain things around the city." 3RP 362, 427. She explained that

Larson wanted to burn down the house because she was good friends with McClellan and was upset that Mark evicted him. 3RP 349-50, 359, 382-84. But she also acknowledged that she was upset and jealous that McClellan was better friends with Larson than with her. 3RP 376, 401.

Stokesberry claimed that she ran away because she was chasing Larson, who she believed "had done something." 3RP 364-65, 380, 416-17, 422-24. She wanted to know why Larson was in her yard and claimed she did not notice any smoke or hear anything unusual before running away. 3RP 366, 416.

During closing argument, the court sua sponte corrected one argument from the prosecutor about Larson being an accomplice. 3RP 471; *see* 3RP 477. Stokesberry did not raise a timely objection to any of the prosecutor's statements challenged on appeal. 3RP 470-74. And she did not request a curative instruction or a mistrial. 3RP 477-78. Rather, she simply noted her objections for "the record." *Id.*

The jury found Stokesberry guilty of first-degree arson and not guilty of conspiracy to commit first-degree arson. CP 184-86, 229-30. The court imposed a 24-month standard range sentence. CP 228-42. Stokesberry timely appealed. *See* CP 206.

IV. ARGUMENT

A. The Court Did Not Abuse Its Discretion by Denying Stokesberry's Motion for a Mistrial.

The trial court did not abuse its discretion by denying the motion for a mistrial. The briefly published statement in the 911 call was not a serious irregularity that materially affected the outcome of the trial. It was cumulative to other testimony and did not reference any criminal conduct or propensity evidence. The trial court properly instructed the jury to disregard the evidence and a redacted copy was published. This cured any potential prejudice, and a mistrial was not warranted.

1. There is not a substantial likelihood that the error materially affected the verdict.

Appellate courts review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Emery*, 174 Wn.2d

741, 765, 278 P.3d 653 (2012). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Appellate courts find abuse only when "no reasonable judge would have reached the same conclusion." *Emery*, 174 Wn.2d at 765.

A trial court's denial of a mistrial motion will be overturned only when there is a "substantial likelihood" the prejudice affected the verdict. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). Reviewing courts determine whether, when viewed in the context of all the evidence, the improper testimony was so prejudicial that the defendant did not get a fair trial. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

In determining the effect of an irregularity, appellate courts examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). These factors are considered

with deference to the trial court, which is in the best position to discern prejudice. *State v. Garcia*, 177 Wn. App. 769, 776-77, 313 P.3d 422 (2013); *State v. Weber* (*Weber I*), 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Although violating a pretrial order is a serious irregularity, an unintentional disclosure of inadmissible criminal history is less serious than an intentional disclosure. *Gamble*, 168 Wn.2d at 178. A curative instruction can be sufficient to remove any prejudicial effect. *See Hopson*, 113 Wn.2d at 284; *Garcia*, 177 Wn. App. at 783-84 (a proper instruction may effectively cure less serious irregularities). Jurors are presumed to follow the court's instructions to disregard improper evidence. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994).

Hopson is instructive. In *Hopson*, the State's witness testified that the victim knew Hopson three years before Hopson "went to the penitentiary last time." *Hopson*, 113 Wn.2d at 276. The trial court sustained Hopson's objection and instructed the jury to disregard the answer. *Id.* The court denied Hopson's

mistrial motion after determining that the statement was not so significant as to affect his right to a fair trial and was not unfairly prejudicial considering other anticipated testimony. *Id.* at 276, 284.

After analyzing the effect of the irregularity, the Supreme Court concluded that the trial court did not abuse its discretion by denying the mistrial motion. *Id.* at 284-87. First, the irregularity was not serious enough to materially affect the outcome of the trial because the jury had "no information concerning the nature or number of prior convictions" and there was "overwhelming evidence" of his guilt. *Id.* at 286. The trial court concluded that the statement was not "earth-shaking" and "not of such significance as to affect the fair trial." *Id.* at 284. The Supreme Court noted that the "trial judge is best suited to judge the prejudice of a statement." *Id.* (quoting *Weber I*, 99 Wn.2d at 166).

Second, although the statement was not cumulative when it was made, the Court noted that Hopson subsequently admitted

evidence of his criminal history through his expert. *Hopson*, 113 Wn.2d at 277, 286. Third, the trial court properly instructed the jury to disregard the evidence, and jurors are presumed to follow the court's instructions. *Id.* at 287. Thus, the Court held that the trial court did not abuse its discretion by denying the mistrial motion. *Id.*

Here, the irregularity was not serious enough to materially affect the outcome of the trial because the jury was not informed of "the nature or number" of any prior arrests or convictions. *See id.* at 286. In fact, there was no reference to any prior criminal conduct by Stokesberry. Ex. 85; 911-RP 2-8. Stokesberry's characterization of the call is misleading. Notably, she did not designate the call as an exhibit or provide a quotation of the challenged statement. The neighbor merely stated that "if you check the 9-1-1 records and non-emergency, we've had the cops out a bunch lately. They had a big fight." Ex. 85 at 1:53-2:04;

911-RP 5.[10] The neighbor merely references making calls to "9-1-1…and non-emergency"—nothing is specific to Stokesberry's conduct. Similar to *Hopson*, where the court determined the statement was not "earth-shaking," here the court concluded that the statement was not a "big deal" and did not justify a mistrial. 3RP 264. The trial court was best suited to judge the prejudice of the statement. *Hopson*, 113 Wn.2d at 284.

Further, like *Hopson*, there was "overwhelming evidence" of Stokesberry's guilt. *See id.* at 286. The neighbor repeatedly states in the 911 call that Stokesberry started the fire and then ran away. Ex. 85A; 911R-RP 2-7; *see also* 3aRP 52. Stokesberry was angry that Mark evicted her boyfriend and warned Mark mere days before the fire that he would "regret it." 3aRP 28-30; 3RP 388, 406. Immediately prior to the fire, an angry Stokesberry arrived at Mark's house with Larson and informed him that

[10] The statement about the "big fight" was not redacted by agreement of the parties and was included in the redacted call. *See* 3RP 266-69; Ex. 85A at 1:53-2:04; 911R-RP 5.

Larson "will be the one that burns the house down." *See* 3aRP 50-52; Ex. 88 at 1:55-2:00, 2:46-2:53. Minutes after Stokesberry went outside, the fire erupted, and Mark watched as Stokesberry ran away while trying to "duck down" behind the fence. 3aRP 52-53, 63-65, 75-81, 108-11, 124-27. Both Lemon and Suzanne Zalot saw Stokesberry start the fire in the carport by lighting what they believed was a barbecue grill. *See* 3aRP 138-42; 3RP 25, 76, 126-31, 152-54. Suzanne saw Stokesberry place "something" down that was "incendiary" and "more than you would normally do for a barbecue[.]" 3RP 127. Minutes later, they heard an explosion, and the house was on fire. 3aRP 139, 144-45; 3RP 27, 127-34. Suzanne then saw Stokesberry "skipping" away. 3RP 133. And Stokesberry gave a false name and date of birth when contacted by an officer. 3RP 192-95, 367.

Moreover, Suzanne heard Stokesberry threaten to light the house on fire multiple times in the year leading up to the fire, with the most recent threat occurring just one week before the fire. 3RP 136-37, 147-49. The fire investigator testified that the

fire was "incendiary" and started in the carport, which was near the area where witnesses saw Stokesberry. *See* 3RP 247-61, 277-98, 305-12. Based on the overwhelming evidence of Stokesberry's guilt, the minor irregularity did not materially affect the outcome of the trial.

As to the second factor, the statement to "check the 9-1-1 records and non-emergency" and reference to the police response was cumulative because the jury previously heard testimony from several witnesses about the constant screaming and yelling at the residence, which led to a police response. *See* 3aRP 35-42, 107-08, 134; 3RP 22-23. Mark testified that the neighbors called the police and that he was embarrassed because they could hear "the screaming in the yard and the constant fighting." 3aRP 38-40, 86. Suzanne testified that Stokesberry and her father "had been fighting" and that approximately one week before the fire, Stokesberry "was outside shouting that she would light the house on fire." 3RP 126, 136, 147-48. She testified that Stokesberry made this threat on multiple occasions and that there was "a lot

of shouting and yelling day and night from her constantly[.]" 3RP 148-50. Suzanne also testified that she called the crisis line for Stokesberry, who refused to talk to them when they arrived. 3RP 162. Stokesberry did not object to the admission of any of this evidence. The admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was previously admitted without objection. *State v. Weber* (*Weber II*), 159 Wn.2d 252, 276, 149 P.3d 646 (2006). And although Stokesberry testified after the 911 call, she also acknowledged that the neighbors heard the frequent yelling and that the police responded to the residence. *See* 3RP 345-51, 368-81.

Stokesberry argues that the statement was not cumulative because nothing in the record indicates she "had any prior arrests or convictions" and the "jury would not have been introduced to [her] criminal past, but for this error." Br. of Appellant at 32. But the 911 call does not reference any arrests, convictions, or her prior "criminal past." *See* Ex. 85; 911-RP 2-8.

As to the third factor, the exhibit was withdrawn, and the trial court properly instructed the jury to disregard it. 3RP 326-27. This cured any potential prejudice. The jury is presumed to follow the court's instructions. *Hopson*, 113 Wn.2d at 287; *Russell*, 125 Wn.2d at 84. Moreover, the court instructed the jury at the start of trial to "disregard any evidence which is not admitted[.]" 3RP 17. And at the conclusion of trial, the court reminded jurors not to consider this evidence:

> One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or *if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.*

CP 160 (emphasis added). Jurors were also instructed that "[i]f evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict" and that they "must disregard any remark, statement, or argument that is not

supported by the evidence or the law in my instructions." CP 160-61.

Garcia is instructive. Garcia was charged with unlawful possession of a firearm and stipulated that he had committed "a serious offense" to prevent the State from introducing his prior robbery conviction. *Garcia*, 177 Wn. App. at 771-76. But the jury instructions inadvertently referenced the robbery. *Id.* at 771, 774. After closing argument, the State explained it tried to sanitize the error by quickly pulling the instruction from the overhead. *Id.* at 774. The court instructed the jury to disregard the "wrong instruction" and read the corrected instruction. *Id.* at 771, 774-75, 781-82. The record indicated that two jurors flagged the reference to robbery in their instructions. *Id.* at 775.

This Court held that the trial court did not abuse its discretion by denying the mistrial motion because the jury's temporary exposure to the improper instruction was not such a serious trial irregularity that it could not be cured by an instruction to disregard it. *Id.* at 772, 776, 782-85. The instruction

did not affirmatively state that he had been convicted of robbery and the jurors who flagged it "simply may have been confused" because there was no evidence of a robbery. *Id.* at 780-81.

Similar to *Garcia*, Stokesberry received a fair trial despite the jury's temporary exposure to the unredacted 911 call, and the court's instruction effectively cured any prejudice. *See id.* at 782-85. Jurors may have simply believed that the neighbor was referring to noise complaints or the police/crisis line response, particularly since the call also referenced a "big fight" within that same context. There is not a substantial likelihood that this minor irregularity, which was cumulative to other testimony, materially affected the verdict.

2. The unredacted 911 call does not contain propensity evidence.

Stokesberry's argument that the statement is tantamount to implying she had the propensity to commit arson is not supported by the record. "Propensity evidence" involves testimony that a defendant committed crimes similar or identical to the one charged. *State v. Condon*, 72 Wn. App. 638, 649, 865

P.2d 521 (1993). Under ER 404(b), evidence of other crimes or bad acts is not admissible to prove the character of a person in order to show action in conformity therewith. The rule is intended to prevent jurors from assuming that defendants committed the current crime because they are a "criminal type". *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). That concern is not present here where there was no mention of prior similar crimes—or *any* crimes—in the 911 call.

Even an isolated comment about jail time, without reference to a specific crime, does not unfairly prejudice a defendant such that a mistrial is required. *Condon*, 72 Wn. App. at 648-50. In *Condon*, a witness twice testified that the defendant had been in jail, which violated a pretrial ruling. *Id.* at 648. The trial court instructed the jury to "completely disregard" the referenced testimony and not consider it during deliberations. *Id.*

The Court affirmed the denial of the mistrial motion, explaining that the testimony was "ambiguous" and the "mere fact that someone has been in jail does not indicate a propensity

to commit murder[.]" *Id.* at 649-50. Although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court's instructions to disregard the statements were sufficient to alleviate any prejudice. *Id.* The Court also noted that the State's evidence was "very strong." *Id.* at 650 n. 2; *see also State v. Clemons*, 56 Wn. App. 57, 62, 782 P.2d 219 (1989) (no abuse of discretion in denying mistrial based on officer's unsolicited comment about "prior contacts" with the defendant, which is "not conclusive" of bad acts).

Here, prior calls to 911 or a "non-emergency" line does not indicate that Stokesberry had a propensity to commit arson—the statement was ambiguous and not conclusive of any prior bad acts. *See Condon*, 72 Wn. App. at 649-50; *Clemons*, 56 Wn. App. at 62. Further, the State's evidence against Stokesberry was strong.

Condon distinguished *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987), which is relied on by Stokesberry. In *Escalona*, testimony that the defendant "has a record and had

stabbed someone" warranted a mistrial because the defendant was charged with a similar crime of assault with a knife. *Escalona*, 49 Wn. App. at 252-53, 256. Thus, the improper testimony indicated the defendant committed a prior similar crime and was "extremely prejudicial" because jurors would likely conclude he had a propensity to commit that type of crime. *Condon*, 72 Wn. App. at 649. *Escalona* was further distinguishable because of the paucity of evidence against the defendant. *See id.* at 650 n. 2; *Escalona*, 49 Wn. App. at 255.

Unlike *Escalona*, there was no concern the jury would conclude Stokesberry had the propensity to commit arson because the 911 call did not reference any prior similar crimes. Stokesberry's claim that the 911 call introduced the jury to her "criminal past" is not supported by the record. The 911 call does not refer to *any* criminal conduct by Stokesberry. Ex. 85; 911-RP 2-8; *see State v. Wade*, 186 Wn. App. 749, 774-75, 346 P.3d 838 (2015) (reference to defendant's prior booking photo does not indicate he was convicted of a crime or had a propensity to

commit murder). Further, unlike *Escalona*, there was strong evidence of Stokesberry's guilt. Accordingly, the trial court did not abuse its discretion by denying the mistrial motion.

B. The Trial Court Did Not Violate Stokesberry's Right To Present a Defense Where It Allowed Other Suspect Evidence and Properly Exercised Its Discretion To Exclude Larson's Prior Bad Acts Under ER 404(b).

The trial court did not violate Stokesberry's right to present a defense where it allowed other suspect evidence, which allowed her to argue her theory of the case that Larson started the fire. And the trial court did not abuse its discretion by excluding evidence of Larson's involvement in prior unrelated fires. These prior bad acts were not material or relevant and were properly excluded as improper propensity evidence under ER 404(b).

1. Standard of Review

The Supreme Court clarified the test for analyzing whether the Sixth Amendment right to present a defense has been violated. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022) (citing *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019)); U.S. Const. amend. VI. First, the reviewing court

analyzes the trial court's evidentiary rulings for abuse of discretion. *Arndt*, 194 Wn.2d at 797-812. A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Dye*, 178 Wn.2d at 548. Reviewing courts defer to the trial court's evidentiary rulings unless "no reasonable person would take the view adopted by the trial court." *State v. Clark* (*Clark II*), 187 Wn.2d 641, 648, 389 P.3d 462 (2017). If there is no abuse of discretion, the Court considers de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. *Arndt*, 194 Wn.2d at 797-98, 812-14.

It is well established that even constitutional errors "may be so insignificant as to be harmless." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State bears the burden of proving beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Id.* An error may be harmless if there is overwhelming evidence of guilt. *Id.* at 425-26. In contrast, an evidentiary error such as

the erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (evidentiary errors under ER 404 are not of constitutional magnitude).

2. The trial court did not abuse its discretion by excluding evidence of Larson's prior bad acts.

Trial courts have wide latitude on the admission or exclusion of evidence because they are in the best position to evaluate the prejudicial effect of evidence. *State v. Harris*, 97 Wn. App. 865, 869-70, 989 P.2d 553 (1999). Although the defendant has the right to present relevant evidence, it is counterbalanced by the State's interest in excluding evidence that is unfairly prejudicial. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). To be relevant, evidence must be both material and probative. *Harris*, 97 Wn. App. at 868. Material means there is some logical nexus between the evidence and the factual issues the jury must resolve. *Id.* at 869. Evidence is relevant if it has

"any tendency to make the existence of any fact that is of consequence…more probable or less probable[.]" ER 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

Washington law places limits on the defendant's ability to blame another person for the crime, also known as other suspect evidence. *State v. Hawkins*, 157 Wn. App. 739, 751, 238 P.3d 1226 (2010). Washington courts have long held that to admit evidence suggesting another person committed the charged crime, the defendant must lay a foundation by establishing "a train of facts or circumstances" that clearly point to someone besides the defendant as the guilty party. *State v. Strizheus*, 163 Wn. App. 820, 830, 262 P.3d 100 (2011) (citing *State v. Downs*, 168 Wn. 664, 667, 13 P.2d 1 (1932)); *Russell*, 125 Wn.2d at 75. "Remote acts, disconnected and outside of the crime itself,

cannot be separately proved for such a purpose." *Downs*, 168 Wn. at 667.

The defendant must show a clear nexus between the person and the crime. *Strizheus*, 163 Wn. App. at 830. Mere motive, ability, and opportunity to commit a crime alone are not sufficient. *Id.* The defendant bears the burden of showing that other suspect evidence is admissible. *Id.* The trial court's decision on the admissibility of other suspect evidence is reviewed for abuse of discretion. *Russell*, 125 Wn.2d at 75.

Here, the trial court permitted Stokesberry to admit other suspect evidence involving Larson because she was at the residence shortly before the fire and there was a "train of facts or circumstances" that pointed to her as a suspect. CP 98; 1RP 30-33; 2RP 7-9, 92-94; *see Strizheus*, 163 Wn. App. at 830.

Stokesberry presented ample evidence of Larson as the suspect. Stokesberry testified that she previously warned her father about Larson's threats and that she warned her father that day that Larson was outside and would be the one who burns

down the house. *See* 3RP 359-64, 377-78, 383, 426-27. She explained that Larson wanted to burn down the house because Larson was friends with McClellan and was upset that Mark evicted him. 3RP 359-63, 382-89, 408-13.

Stokesberry also testified that she saw her set a shopping cart on fire and has "heard other people talk about Lisa burning" and "heard many people say that Lisa's known to burn certain things around the city." 3RP 362, 427. She explained that she chased Larson that day because she believed Larson had "done something." 3RP 364-65, 416-17. Thus, Stokesberry presented other suspect evidence at trial and was able to argue her theory of the case that Larson started the fire. *See* 3RP 478-90.

But the trial court did not abuse its discretion by excluding police reports and testimony from police officers investigating Larson's involvement in four prior unrelated fires over a three-year period. *See* CP 96-99.[11] The trial court properly determined

[11] Stokesberry conceded it would be improper for her to testify about Larson's prior criminal cases or convictions. 3RP 337-38.

that these incidents were not "other suspect evidence" but rather improper propensity evidence under ER 404(b). *See* CP 98-99; 1RP 28-37.

Generally, evidence of prior misconduct is inadmissible to demonstrate the person's propensity to commit the charged crime. ER 404(b); *see State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009); *State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (rejecting "once a thief, always a thief" rationale for admitting evidence).

To admit ER 404(b) evidence, the trial court must: (1) find by a preponderance of the evidence the misconduct occurred; (2) identify the purpose of admitting the evidence; (3) determine whether the evidence is relevant to prove an element of the charged crime; and (4) weigh the probative value against the prejudicial effect. *Fisher*, 165 Wn.2d at 745. Even when evidence is admissible under ER 404(b), the trial court has discretion to exclude it if the probative value is substantially

outweighed by the danger of unfair prejudice. *State v. Perez-Valdez*, 172 Wn.2d 808, 815, 265 P.3d 853 (2011); *see* ER 403.

In *State v. Acosta*, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004), this Court determined that the defendant's prior arrests and convictions were not relevant to his intent to commit the current crimes, and any probative value was far outweighed by the danger of unfair prejudice. The Court concluded it was inadmissible "bad character" evidence, noting that the arrests are "unproved allegations", and the record does not indicate the intent behind the acts or convictions. *Id.* at 434-37.

Here, the trial court properly exercised its discretion in determining that evidence of prior unrelated fires had no nexus or similarities to the charged crime. *See* CP 98-99; 1RP 28-37; *see Russell*, 125 Wn.2d at 75-77 (other suspect evidence inadmissible because there were no obvious similarities between the incidents). The trial court conducted the required balancing test under ER 404(b) and properly concluded that the four prior bad acts were prohibited as improper propensity evidence. *See*

CP 96-99; 1RP 28-37. The evidence improperly inferred that Larson was predisposed to commit the arson because she was investigated for starting several unrelated fires over a three-year period. *See Acosta*, 123 Wn. App. at 434-37. Further, only one of the prior bad acts resulted in a conviction—the others were "unproved allegations." *See id.* at 434; *see also* CP 11-12, 21-79.

The trial court also properly determined that any minimal relevance of the evidence was outweighed by the danger of unfair prejudice. *See* CP 98-99. The reports from the 2017 incident indicate that the fire was accidentally started by someone other than Larson. CP 71-79, 97-98; 1RP 30-31. And the June 2020 incident involved a male starting a fire in a garbage can at a church, and Larson was later observed fanning the flames. CP 30-41, 97-99; 1RP 32. Larson was not convicted of these crimes, and the trial court properly determined that Stokesberry failed to show by a preponderance of the evidence that these incidents occurred. *See* CP 30-41, 71-79, 98; 1RP 36-37.

The trial court also properly determined that the other two incidents were "very attenuated" and tangential to the current crime and did not share any similar characteristics. *See* CP 98-99; 1RP 36-37. The 2019 incident involved Larson fighting with a woman at Walgreen's and lighting a blanket on fire. CP 50-70, 97-99; 1RP 31. And the March 2020 incident involved Larson using a lighter to melt some siding on a medical building. CP 42-49, 97-99; 1RP 31-32.

These prior bad acts were neither material nor relevant. They did not show the motive, opportunity, or intent of Larson to commit the charged crime and were properly excluded as improper propensity evidence under ER 404(b).

3. Stokesberry's right to present a defense was not violated.

The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution guarantee defendants the right to present testimony in their defense. *Hudlow*, 99 Wn.2d at 14-15. But it is well settled that the right to present a defense is not absolute. *Strizheus*, 163 Wn. App. at 830.

"There is no right, constitutional or otherwise, to have irrelevant evidence admitted." *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); *see* ER 402 (irrelevant evidence is inadmissible). Here, evidence of unrelated fires that Larson may or may not have started that were not similar to the charged crime was not relevant. Stokesberry did not have a right to admit this irrelevant evidence.

Stokesberry's reliance on *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996) is misplaced. In *Maupin*, witness testimony that the victim was seen after the kidnapping with someone other than the defendant was relevant because it connected the other suspect to the charged crime and pointed to him as the guilty party. *Id.* at 926-28; *see also State v. Clark* (*Clark I*), 78 Wn. App. 471, 479-80, 898 P.2d 854 (1995) (defendant provided a trail of evidence sufficiently strong to allow other suspect evidence where the other suspect had the motive, opportunity, and ability to commit the arson).

Here, the trial court properly allowed Stokesberry to admit testimony connecting Larson to the charged crime and pointing to her as the guilty party. Stokesberry presented evidence that Larson had the motive, opportunity, and ability to commit the arson. 3RP 359-65, 377-89, 408-17, 422-28. Thus, other suspect evidence was properly admitted, and her right to present a defense was not violated. *See Maupin*, 128 Wn.2d at 926-28; *see also Clark I*, 78 Wn. App. at 479-80.

But the trial court properly excluded evidence that had no relevance to the charged crime. Stokesberry's reliance on *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 359 P.3d 919 (2015) is misplaced. In *Cayetano-Jaimes*, testimony from the victim's mother that she never left the victim in the defendant's care, if believed, would have provided a complete defense to the child rape charge. *Id.* at 289-91, 300. The Court concluded that the trial court violated the defendant's right to present a complete defense by preventing this evidence of "extremely high probative value" that was material and vital to his defense. *Id.* at 300-03.

Here, police reports and testimony from police officers investigating Larson's involvement in prior unrelated fires was not evidence of "extremely high probative value" that was material or vital to Stokesberry's defense. *See id.* The trial court properly excluded this evidence after conducting the required balancing test. *See* CP 98-99. Further, *Cayetano-Jaimes* involved the confrontation clause and preference for live testimony, and the State had the ability to test the reliability of the witness's testimony by cross-examining her. *Cayetano-Jaimes*, 190 Wn. App. at 298-303. Here, the State could not test the reliability of the witnesses' statements because Stokesberry intended to offer them as hearsay statements through police reports and officer testimony. *See* CP 16-17, 83-88.

But even assuming it was error to exclude Larson's prior bad acts, an evidentiary error under ER 404(b) is not of constitutional magnitude and requires reversal only if, within reasonable probabilities, the outcome of the trial would have been different. *See Jackson*, 102 Wn.2d at 695; *Stenson*, 132

Wn.2d at 709. Based on the overwhelming evidence of Stokesberry's guilt, exclusion of the evidence did not materially affect the outcome. Even applying the constitutional harmless error standard, any error was harmless because a reasonable jury would have reached the same result. *See Guloy*, 104 Wn.2d at 425-26.

C. Stokesberry Did Not Timely Object to the Prosecutor's Statements in Closing Argument or Request Any Remedy and Has Not Shown That the Statements Were So Flagrant and Ill-Intentioned That a Curative Instruction Could Not Have Cured Any Prejudice.

Stokesberry failed to raise a timely objection to statements made by the prosecutor during closing argument and did not request a curative instruction or a mistrial. She has not shown that any improper statements were so flagrant and ill-intentioned that an instruction could not have cured any prejudice. The prosecutor's one incorrect statement about accomplice liability was immediately corrected sua sponte by the court, which cured any prejudice. In the context of the total argument, the instructions from the court, and the overwhelming evidence of

guilt, Stokesberry has not shown prejudicial error warranting reversal.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). "The hurdles to obtaining relief based on prosecutorial misconduct are purposefully high." *State v. Richmond*, 16 Wn. App. 2d 751, 754, 482 P.3d 971 (2021). "Not every prosecutorial misstep merits remand." *Id.*

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *Thorgerson*, 172 Wn.2d at 442; *see State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Once a defendant establishes that a statement was improper, reviewing courts determine whether there was prejudice by applying one of two standards of review. *Emery*, 174 Wn.2d at 760.

If the defendant makes a timely objection at trial, the defendant must show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Id.* at 760, 763. The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Thorgerson*, 172 Wn.2d at 443. Under this heightened standard, if the defendant "failed to object *at the time the misconduct occurred*, he must establish that no curative instruction would have obviated any prejudicial effect on the jury" and that the prejudice had a substantial likelihood of affecting the verdict. *See id.* at 455 (emphasis added).

Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. *Emery*, 174 Wn.2d at 762. The prejudicial effect of a prosecutor's improper argument is not viewed in isolation—it is reviewed in

the context of the entire trial and total argument, including the evidence presented, the issues in the case, and the instructions given to the jury. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). If a defendant objects or moves for a mistrial, reviewing courts defer to the ruling of the trial court, which is in the best position to determine if the misconduct prejudiced the defendant's right to a fair trial. *Stenson*, 132 Wn.2d at 719.

1. The prosecutor did not repeatedly misstate the law.

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Stokesberry's claim that there were "five instances of misconduct" is not supported by the record. She fails to meet her burden of showing that the statements were improper in the context of the entire record. *See Thorgerson*, 172 Wn.2d at 442.

Accomplice liability depends on whether the defendant had knowledge the principal would commit the crime. *Allen*, 182 Wn.2d at 369; RCW 9A.08.020(3)(a) (defining accomplice liability). Here, the prosecutor explicitly referred to the

accomplice liability jury instruction when first addressing accomplice liability during closing argument. 3RP 470. This instruction provides:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 173. Although Stokesberry challenges the prosecutor's initial explanation to the jury, claiming that he "confused the issue," she

acknowledges that he "corrected himself." Br. of Appellant at 35. The prosecutor *immediately* corrected himself with an accurate statement of the law:

> Instruction No. 12 tells you what an accomplice is and a person is an accomplice as in Ms. Stokesberry -- or sorry, Lisa is an accomplice and Ms. Stokesberry is an accomplice to Lisa's crime if he or she solicits, commands, encourages or requests another person to commit the crime or aids or agrees to aid another person in planning or committing the crime.

3RP 470 (citing CP 173). The prosecutor then quoted directly from the jury instruction and accurately summarized the law both verbally and in the PowerPoint. *See* 3RP 470; CP 173, 277-82.

Although the prosecutor then framed the wrong issue for the jury by stating, "the question is, is Lisa an accomplice" and noting that Lisa is "present at the scene and ready to assist" by her presence, the trial court interjected sua sponte and gave the jury a correct statement of the law. 3RP 470-71. The prosecutor argued:

> So it's the state's position that Ms. Stokesberry started this fire. But again, the defense is going to

> argue that Lisa was the one that started the fire, so the question for you as the jury is if you decide or if you believe for a second that Lisa was the one that started the fire. She is an accomplice. And in this case she is. She's here present at the scene and ready to assist by aiding in her presence.

3RP 470-71. The court immediately interjected:

> I need to correct something. The issue is not whether or not Ms. Larson is an accomplice. The issue is whether or not Ms. Stokesberry is an accomplice of Ms. Larson with that version of the events and so it's an important distinction.

3RP 471. The court then explained that if "Larson chose to do this on her own" then "Ms. Stokesberry is not guilty. I don't want any confusion about that." *Id.* Thus, the court cleared up any confusion by giving the jury a detailed, accurate statement of the law. The prosecutor then argued the correct theory of accomplice liability, with Stokesberry acting as an accomplice:

> Lets talk about Ms. Stokesberry acting as an accomplice. Ms. Stokesberry can act as an accomplice if she aids or agrees to aid in another person in planning or committing the crime.
>
> So is she helping Lisa, or Ms. Larson, commit this crime and is she present at the scene and ready to assist, is she giving words, acts, encouragement,

> support or her presence there? And the answer is yes.

3RP 471-72. This was proper. Stokesberry's claim that the prosecutor subsequently misstated the meaning of accomplice liability is not supported by the record. Instead, Stokesberry quotes only a portion of the argument and takes it out of context. *See* Br. of Appellant at 36 (quoting 3RP 474). The prosecutor properly argued that accomplice liability may be considered if jurors believe Larson started the fire:

> Now, all of this conspiracy, accomplice liability is only under consideration if defense's theory of the case, that is that Ms. Larson started this fire, is taken into serious consideration by you, the jury. Because what that means is, again, some of you may decide that Ms. Stokesberry started the fire, some of you may decide that Ms. Larson started the fire, but either way, if one or the other acting as an accomplice to the other, they are guilty of the crime of arson in the first degree.

3RP 474. This argument was proper and consistent with the jury instructions. *See* CP 173-74. The State had to prove that "the defendant or an accomplice caused a fire or explosion". CP 174. The prosecutor repeatedly argued that Stokesberry started the

fire. 3RP 470, 474-76, 503. This alternative argument properly explains that jurors can still find Stokesberry guilty under accomplice liability if they believe Larson started the fire.

Jury instructions must accurately convey the State's burden to prove each element of the crime beyond a reasonable doubt. *State v. Osman*, 192 Wn. App. 355, 369, 366 P.3d 956 (2016). Here, the instructions accurately conveyed the State's burden of proof, which included the following instruction on reasonable doubt:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of

> evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 164; *see also* CP 174, 178. Arguments that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). An "abiding belief in the truth of the charge" connotes both duration and strength of conviction. *Osman*, 192 Wn. App. at 375. In *Osman*, the Court looked to the United States Supreme Court for guidance on the meaning of "abiding," which was described as "settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence." *Osman*, 192 Wn. App. at 374 (quoting *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S. Ct. 1239, 127 L.Ed.2d 583 (1994)).

Here, the State did not misstate or minimize the meaning of reasonable doubt. Stokesberry mispresents the record when she claims the prosecutor argued "'if you believe for a second that Stokesberry started the fire', then she was guilty." *See* Br. of

Appellant at 34. This alteration of the prosecutor's argument is misleading—she misquotes the prosecutor's statement and adds words he never said. *See* 3RP 471.[12] First, the prosecutor referred to Lisa—not Stokesberry:

> Stokesberry started this fire. But again, the defense is going to argue that Lisa was the one that started the fire, so the question for you as the jury is if you decide or *if you believe for a second that Lisa was the one that started the fire. She is an accomplice*.

3RP 470-71 (emphasis added). Second, the prosecutor did not link this argument to the burden of proof or the meaning of reasonable doubt. Rather, he explained how to apply accomplice liability if the jurors rejected the State's argument that "Stokesberry started this fire." In closing, the prosecutor repeatedly argued that Stokesberry started the fire. 3RP 470, 474-76, 503. The challenged statement simply alerted jurors to accomplice liability if they were contemplating during

[12] Stokesberry's citation to the record incorrectly identifies the statement as located on page 470 instead of page 471.

deliberations that Lisa started the fire. Context matters. In this context, the statement was not improper.

Third, the trial court immediately corrected the prosecutor's incorrect framing of the issue as Larson as the accomplice. *See* 3RP 471. And the prosecutor then used the same phrase to correctly explain the alternative accomplice liability theory by stating, "If you believe for a second that Ms. Larson is the one that caused the fire, Ms. Stokesberry's presence there serves as a distraction…she knows that Ms. Larson is there to commit a fire, Ms. Larson has threatened to do so, and she is there distracting Mr. Stokesberry." 3RP 472. Like the previous statement, this was not in the context of explaining the burden of proof or reasonable doubt. The prosecutor did not argue that an abiding belief was a fleeting or short-lived belief and did not suggest that the burden of proof was anything less than guilt beyond a reasonable doubt. In context, the statement was not improper.

Although Stokesberry is correct that repetitive misconduct can have a "cumulative effect" on the jury, the record does not support her claim that the prosecutor repeatedly misstated the law. *See Allen*, 182 Wn.2d at 376. She has not met her burden of showing improper conduct.

2. Stokesberry waived any claim of error by not raising a timely objection or requesting a remedy.

Stokesberry did not timely object to the prosecutor's statements and did not request a curative instruction or a mistrial. Thus, she has waived any claim of error.

The differing standards of review are based on a defendant's duty to raise a timely objection to a prosecutor's improper argument. *Emery*, 174 Wn.2d at 761-63. The Supreme Court has consistently held that unless a prosecutor's conduct is so flagrant and ill-intentioned that a corrective instruction could not cure the prejudice, "any objection to such conduct is waived by failure to make an adequate *timely* objection *and* request a curative instruction." *State v. Swan*, 114 Wn.2d 613, 661, 790

P.2d 610 (1990) (emphasis added). "Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction." *Id.*

"A defendant properly preserves the issue for appeal when he objects immediately." *Allen*, 182 Wn.2d at 381; *see State v. Classen*, 143 Wn. App. 45, 64-65, 176 P.3d 582 (2008) (counsel must alert the court to the alleged error at a time when it can be corrected). A party must object to improper remarks during closing argument "*at the time they are made*…to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." *Emery*, 174 Wn.2d at 761-62 (quoting 13 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 4505, at 295 (3d ed. 2004) (emphasis added)).

"Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *Russell*, 125 Wn.2d at 85; *see Allen*, 182 Wn.2d at 381

(defendants are required to request a curative instruction if they did not timely object). Further, the absence of a motion for mistrial at the time of the argument strongly suggests that the argument did not appear critically prejudicial in the context of the trial. *Swan*, 114 Wn.2d at 661; *see Lindsay*, 180 Wn.2d at 441-42 (motion for mistrial directly after prosecutor's closing argument preserves the issue for review).

Here, Stokesberry failed to raise a timely objection to any of the statements challenged on appeal. *See* 3RP 470-74. Her failure to object at the time the statements were made prevented the court from correcting any error or issuing a curative instruction. *See Emery*, 174 Wn.2d at 761-62; *Classen*, 143 Wn. App. at 64-65. Stokesberry did not object until after the closing argument when the jury had already been excused, and she did not request a curative instruction or a mistrial. 3RP 476-78. Thus, any claim of error is waived. *See Swan*, 114 Wn.2d at 661.

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3. Stokesberry has not shown that any errors were so flagrant and ill-intentioned that a curative instruction would not have cured any prejudice.

Even if this Court determines that any of the statements were improper and an analysis of prejudice is warranted, the statements were not so flagrant and ill-intentioned that a curative instruction would not have cured any prejudice.

This Court must consider what would likely have happened if Stokesberry had *timely* objected. *See Emery*, 174 Wn.2d at 763. *State v. French*, 101 Wn. App. 380, 4 P.3d 857 (2000) is instructive. In *French*, the defendant waited until after the prosecutor's closing argument and objected outside the presence of the jury to the prosecutor's argument that shifted the burden of proof. *Id.* at 383.

The Court noted that the defendant could have objected during the argument but instead made a tactical decision not to object and merely stated that he wanted his objection "noted for the record." *Id.* at 387. His failure to request any relief until after the jury found him guilty "strongly suggests to a court that the

argument…did not appear critically prejudicial...in the context of the trial." *Id.* at 387-88 (quoting *Swan*, 114 Wn.2d at 661). Thus, the Court reviewed the improper comment solely in the context of whether it was so flagrant and ill-intentioned that it could not have been cured by an instruction and concluded that the improper and isolated comment would have been curable. *French*, 101 Wn. App. at 388.

Here, similar to *French*, Stokesberry did not object during the closing argument and did not request any relief—she merely wanted her objections noted "on the record." 3RP 477-78. The failure to request any relief "strongly suggests" that the statements were not "critically prejudicial" and could have been cured by an instruction that was never requested. *See French*, 101 Wn. App. at 387-88. An objection and request for a curative instruction could have remedied any misstatement or potential for prejudice. The trial court could have directed the jury's attention to the instructions or explained the law—just as it did

sua sponte when the prosecutor incorrectly framed the accomplice liability issue.

Swan is instructive. In *Swan*, the defendant objected to a statement made by the prosecutor in closing argument, and the court sustained the objection and instructed the jury to disregard the remark. *Swan*, 114 Wn.2d at 660-61. The Supreme Court concluded there was no prejudicial error because the jury is presumed to follow the court's instructions. *Id.* at 661-62.

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) and *Emery* are also instructive. In *Warren*, the defendant promptly objected to the prosecutor's repeated misstatements of the burden of proof. *Warren*, 165 Wn.2d at 23-27. The trial court intervened during the argument and gave an appropriate curative instruction. *Id.* at 25, 28. Warren did not seek any additional instructions or a mistrial. *Id.* at 26. The Supreme Court concluded that the instruction cured any error and that Warren failed to show prejudice. *Id.* at 28.

Similarly, in *Emery*, the prosecutor's statements improperly shifted the burden of proof to the defendant. *Emery*, 174 Wn.2d at 759-63. The Supreme Court noted that the statements were "remarkably similar to the statements we analyzed in *Warren*" and could have been cured by a proper instruction had the defendant objected. *Emery*, 174 Wn.2d at 763-65.

Here, similar to *Emery*, any improper statements could have been cured by a proper instruction had Stokesberry timely objected and requested a remedy. Further, the prosecutor's one inartful explanation of accomplice liability was not prejudicial because the trial court immediately gave an appropriate curative instruction. *See Warren*, 165 Wn.2d at 25-28. Jurors are presumed to follow the court's instructions. *Swan*, 114 Wn.2d at 662.

Stokesberry's reliance on *Allen* is misplaced. In *Allen*, the prosecutor repeatedly misstated the "knowledge" standard for accomplice liability in both argument and in the slide show, the

trial court twice overruled Allen's timely objections in the jury's presence thereby implying that the statements were proper, and the record indicated that the jury was influenced by the improper statement because it submitted a question about the knowledge standard during deliberations. *Allen*, 182 Wn.2d at 375-79. Unlike *Allen*, the prosecutor did not repeatedly misstate the law, Stokesberry did not object when any of the statements were made, and there is no evidence that the jury was influenced by any improper statement during deliberations.

Stokesberry's reliance on this Court's unpublished opinion in *State v. Wilson*, No. 54241-2-II, 2021 WL 6052820 (Wash. Ct. App. Dec. 21, 2021) (unpublished) is also misplaced. In *Wilson*, accomplice liability was a "key issue." *Id.* at *10-11. Here, it was not. The State repeatedly argued that Stokesberry was the one who started the fire. 3RP 470, 474-76, 503.

Further, the prejudicial effect of an improper statement is not viewed in isolation but within the context of the entire trial and total argument, the evidence presented, and the instructions

given. *Monday*, 171 Wn.2d at 675. During closing argument, the prosecutor reminded jurors it was their duty to follow the law as instructed by the court. 3RP 459, 465. He referenced the jury instructions and outlined the elements the State was required to prove. *See* 3RP 465-74, 491-93, 503; CP 277-82. And he repeatedly argued the correct application of accomplice liability. *See* 3RP 466-72, 474. Further, the court properly instructed the jury on accomplice liability and reasonable doubt. *See* CP 164, 167-68, 173-74. And Stokesberry does not challenge these instructions.

A prosecutor may make an inartful expression of what was intended, which is why the court instructs the jury to disregard statements that are not supported by the evidence or the law. Here, the jury received such an instruction. CP 161 ("The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions."). Jurors are presumed to follow the court's instructions. *Swan*, 114 Wn.2d at 662.

Considering the context of the total argument, the issues in the case, the evidence presented at trial, and the instructions given, Stokesberry has not shown prejudice warranting reversal.

And although Stokesberry makes a conclusory statement that the conspiracy charge was "difficult to understand and confusing", she does not challenge any specific statements made by the prosecutor for the conspiracy charge. *See* Br. of Appellant at 34-36.[13] And Stokesberry cannot show prejudice because the jury found her not guilty of the conspiracy charge. *See* CP 186.

But even if this Court determines that Stokesberry timely objected at trial, she has not shown that any misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *See Emery*, 174 Wn.2d at 760-63. The evidence of Stokesberry's guilt was overwhelming.

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[13] The one argument she references as involving the conspiracy charge actually involves the arson charge. *Compare* Br. of Appellant at 34 *with* 3RP 471-72.

D. The Cumulative Error Doctrine Is Inapplicable Because Stokesberry Has Not Shown That Multiple Errors Deprived Her of a Fair Trial.

Under the cumulative error doctrine, the defendant must show that the combined effect of multiple errors requires a new trial. *Clark II*, 187 Wn.2d at 649. Courts consider whether the totality of circumstances substantially prejudiced the defendant and denied her a fair trial. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Errors that had little or no effect on the outcome of the trial do not have a prejudicial effect depriving the defendant of a fair trial. *Greiff*, 141 Wn.2d at 929-30. There is no prejudicial error if the evidence against the defendant is overwhelming. *Cross,* 180 Wn.2d at 691.

Here, each of Stokesberry's individual claims lack merit. She has not met her burden of showing that the combined effect of multiple errors was so prejudicial that she was deprived of a fair trial. Further, the evidence of her guilt was overwhelming.

Thus, there was no prejudicial error, and the cumulative error doctrine does not apply.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the conviction.

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RESPECTFULLY SUBMITTED this 28th day of July, 2022.

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PIERCE COUNTY PROSECUTING ATTORNEY

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